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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

Civil.
No. 715

ST. LOUIS MAILERS' UNION LOCAL NO. 3,
Petitioner,

vs.

GLOBE-DEMOCRAT PUBLISHING COMPANY, a
Missouri Corporation,
Respondent.

BRIEF

Of Respondent, Opposing Grant of Certiorari.

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STATEMENT OF THE CASE.

We adopt the petitioner's statement of the case, which is correct and fair as far as it goes. However, we add the following facts:

Notice of the contract to print the Globe-Democrat by Pulitzer Publishing Company, effective when the pending strike was settled, which the petitioner's complaint claims to have been violative of the labor agreement, was given to the members of the plaintiff's union who were employees of the Globe-Democrat by mail on the day the contract was executed, February 27, 1959, and a copy of the notice was read to representatives of the plaintiff union in person on the same day (R. 38). During the more than ninety days between the giving of this notice and the resumption of publication, June 1, 1959 (R. 37),

the union did not carry out (R. 67) the procedure leading to the arbitration of a dispute under the contract (R. 10).

Instead, suit was filed in the Circuit Court of the City of St. Louis entitled "Monterosso et al. v. St. Louis Globe-Democrat Publishing Company" for damages on account of the alleged violation of the dismissal pay provisions of the same contract which is in dispute here (Sup. R. 1, et seq.), in which plaintiff alleged:

> "In this regard plaintiff states that each and every other member of the labor organization of which he is a member does by leave join in this action as a party plaintiff."

The joining plaintiffs in the Monterosso suit (Sup. R. 7, 8, 9) are identical with the persons named as beneficiaries of the present suit (R. 1, 29). One of the items claimed in this action as damages to the union was as follows (R. 4):

> "Further, Plaintiff as a direct and proximate result of Defendant's breaches were caused to expend monies for attorney's fees and expenses in the prosecution of litigation on behalf of its individual members against Defendant, 'Globe', in their individual attempts to collect vacation credits and severance pay in the amount of $6,000.00, said members being identified in Exhibit 'B' hereto attached."

It was agreed by the parties and recorded in the pretrial order (R. 55):

> "4. The parties agreed at the time this dispute arose to waive the arbitration of provisions of the collective bargaining agreement. Thereafter the matters in issue were litigated in the state court action and after the state court litigation was completed, this suit was filed in the United States District Court."

The outcome of the Monterosso case is reported at 368 S. W. 2d 481 (Sup. R. 1).

SUMMARY OF ARGUMENT.

The question stated at page 2 of petitioner's petition for certiorari is not presented by the record of this case because:

1. The lower courts did not "arbitrate" a dispute between the parties—they adjudicated the only claim brought by plaintiff, i. e., for money damages for breach of contract.

2. The "mandatory" arbitration provision in the parties' contract was not only not invoked by the plaintiff —it was waived, both by necessary implication and expressly.

ARGUMENT.

1.

Petitioner states that the following question is presented (Petition, p. 2):

> "Can a federal court arbitrate and decide a contract dispute between a company and a union when the labor agreement between the parties contains a mandatory arbitration provision?"

Correspondingly, petitioner defines the relief sought here in these words (Petition, p. 7):

> "The petitioner is entitled to have the dispute herein resolved by invoking the common law of the newspaper industry through the enforcement of the mandatory arbitration method by which these parties agreed to resolve their disputes. We ask this court to enforce that right."

The question might be a proper one for decision, and the relief sought might be appropriate in some other case, but the question stated is not and cannot be "expressed in the terms and circumstances" of the record presented by this case [S. Ct. Rule 23, 1 (c)], and the relief sought here could not be afforded under petitioner's own pleadings below.

This application is drafted as if the union, after properly invoking arbitration (Contract, Art. III, R. 10), and assuming a refusal by the Globe-Democrat to arbitrate, had brought an action in the United States District Court to compel arbitration under 29 U. S. C. A. 185, subject to the defenses of laches, limitations, waiver, estoppel, election of remedies, etc.

But this is simply not such an action. It is an action to recover money damages (R. 4), including punitive damages (R. 5) aggregating $6,002,000.00 (R. 5) for breach of

the contract in three specified respects (R. 2, 3), *none of which was a refusal to arbitrate.*

The courts below adjudicated the claim which petitioner, as the plaintiff below, brought to court. No error is charged in the adjudication itself; error is claimed only in that the courts failed to adjudicate another claim, not brought.

As nearly as we make it out, then, petitioner's reason for seeking the writ is that the court below should have redrafted the complaint petitioner filed, should have recast the stipulation of facts petitioner submitted, and should have granted relief which petitioner **did not pray** for.

This is not such a reason for the writ as is contemplated by Rule 19, 1 (b) of this court.

2.

Petitioner with commendable frankness proclaims that up until the time that it filed its Reply Brief in the Appellate Court it had always treated this litigation as a suit for money damages for breach of the manning provisions of the labor contract (R. 6), which is what is reflected by the complaint (R. 2, 3), the decision of the District Court (Pet., p. 9), and the opinion of the Court of Appeals (Pet., p. 19). Petitioner states that in its Reply Brief in the Court of Appeals it " 'shifted gears' in this litigation and prayed for the enforcement of the mandatory arbitration clause by the Appeals Court" (Pet., p. 6). Some shift: from high to reverse! The doctrine of res adjudicata in the Monterosso suit was raised as a defense to the claim pleaded in the District Court by the petitioner, on the theory that the petitioner by prosecuting the claim of its members (R. 50, 51) had control of the litigation, or at the very least participated in it, and therefore is bound by its outcome. U. S. v. Candelaria, 271 U. S. 432, 70 L. Ed. 1023, 46 S. Ct. 561, 564. The District Court never reached

this contention, since it determined that there was not shown as a matter of law any breach of the contract provision (Pet. p. 15). But whether or not there was an election of remedies at the time the Monterosso suit was filed, there was certainly an election made by this plaintiff when the complaint *in this case* was filed. At that time the union sought to enforce its rights by litigation. This is incompatible with the position taken now that these rights must be enforced by arbitration. One cannot litigate and lose on the merits and then assert that he as plaintiff should have gone to another court. Perego v. Dodge, 16 S. Ct. 971, 163 U. S. 160, 41 L. Ed. 813.

Accordingly, this petitioner is forbidden from "shifting gears" not only by its action in supporting the state court litigation, but by its action in instituting this litigation. It is in effect seeking to have three bites at the same apple.

Nowhere in the record of this case is there the slightest suggestion that the union has at any time sought to invoke the procedures leading to arbitration under the contract. Quite naturally there is no corresponding allegation that the Globe-Democrat had ever refused to arbitrate. Neither of these requisite facts is incorporated in the stipulation on which both this suit and the Monterosso suit was submitted (R. 55, 36). The very purpose of the ninety-day provision in the contract respecting notice of a change in process which was the subject of dispute (Par. 5b, R. 3) is to give time to permit resolution of the dispute by arbitration before the manning of the new "process" should commence (R. 8, 9). Thus the parties have set their own statute of limitations, or, one might say, the period in which laches will be deemed to have run. The contract complained of was executed (R. 2), and notice thereof given February 27, 1959 (R. 38). It became effective, and manning commenced June 1, 1959 (R. 39). This is November, 1965, six years and five months later. So far at least as the record discloses, no effort has been made *to this date* to initiate arbitration of this dis-

pute. The first hint of the claim of such a right was, as petitioner concedes, in its Reply Brief in the Court of Appeals filed February 17, 1965, six years after the contract (Pet. 6). This suggestion was made after years of litigation, fostered or brought by this petitioner in all of which, in all courts, it was unsuccessful.

In electing to submit its claim for decision to a court,—indeed not to one court, but two,—it waived by necessary implication the right to have the same claim decided by arbitration.

Essington v. Parish, 164 F. 2d 725.

But more than this, in order to prevent the employer from aborting the assertion in court of the union's disputed claims by insisting upon the arbitration procedure, the claimants, represented by the union, expressly waived arbitration. The pre-trial order below, to which petitioner has not excepted, recites (R. 55):

> "The parties" [the *Federal Court* parties, the Union and the Globe] "agreed and stated to the Court the following which is hereby ordered incorporated into the record for consideration on the cross motions for summary judgment:
>
> * * * * * * * *
>
> "4. The parties agreed at the time this dispute arose to waive the arbitration of provisions of the Collective bargaining agreement."

It is time that the litigation cease.

Respectfully submitted,

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Of Counsel.